

NOTICE  
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2013 IL App (4th) 111081-U

NO. 4-11-1081

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED  
March 12, 2013  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
EARL E. CLAY,	)	No. 08CF595
Defendant-Appellant.	)	
	)	Honorable
	)	Harry E. Clem,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.  
Justices Pope and Harris concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where defendant failed to set forth the gist of a constitutional claim in his postconviction petition, the trial court did not err in dismissing the petition at the first stage.

¶ 2 In August 2008, a jury found defendant, Earl E. Clay, guilty of unlawful possession with intent to deliver a controlled substance. In April 2009, the trial court sentenced defendant to 15 years in prison. This court affirmed his conviction and sentence on direct appeal. In August 2011, defendant filed a *pro se* postconviction petition, which the trial court dismissed as frivolous and patently without merit.

¶ 3 On appeal, defendant argues the trial court erred in summarily dismissing his postconviction petition. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In April 2008, the State charged defendant by information with two counts of unlawful delivery of a controlled substance (counts I and II) (720 ILCS 570/401(d) (West 2008)), alleging he knowingly and unlawfully delivered less than one gram of a substance containing cocaine. The State also charged him with one count of unlawful possession with intent to deliver a controlled substance (count III) (720 ILCS 570/401(d) (West 2008)), alleging he knowingly and unlawfully possessed with the intent to deliver less than one gram of a substance containing heroin. Defendant pleaded not guilty.

¶ 6 In August 2008, defendant's jury trial commenced. Misty Story testified she had prior convictions for burglary and theft. After she was arrested while on probation, and fearing she would be going to jail, Story agreed to work with the police on a controlled drug purchase. She told the police she could purchase drugs from a male known as "Thirty," identified as defendant.

¶ 7 On February 12, 2008, Story called defendant and asked to purchase crack cocaine. Story picked up defendant and they drove to Auto Zone. She handed him money, and defendant gave her crack cocaine. On February 20, 2008, Story called defendant and asked to meet with him at a McDonald's. Defendant arrived and sold "the dope" to Story. On April 1, 2008, police officers pulled over Story and defendant in her car. Both were arrested.

¶ 8 Champaign County sheriff's deputy Andrew Good testified to the controlled drug purchase made by Story on February 12, 2008. After the purchase, Story met with Good and gave him the crack cocaine (exhibit No. 1). Good also received the crack cocaine Story obtained from defendant on February 20, 2008, and identified it as exhibit No. 4. Defendant was arrested following the traffic stop on April 1, 2008.

¶ 9 Champaign County sheriff's deputy Craig Dilley testified he placed defendant under arrest on April 1, 2008. While transporting defendant to the satellite jail, Dilley told him that if he had anything on him "he would be in more trouble if he took it inside the jail with him." Upon arriving at the jail, defendant informed Dilley he was carrying heroin in his crotch. Dilley recovered the heroin from defendant's pant leg and identified it as exhibit No. 7. After reading defendant his *Miranda* rights (*Miranda v. Arizona*, 384 U.S. 436 (1966)), defendant told Dilley he had sold crack cocaine in the past and currently only sold heroin.

¶ 10 The parties entered into a stipulation involving substance analysis performed by Josh Stern, a forensic scientist with the Illinois State Police. Exhibit No. 1 contained 0.6 grams of a substance containing cocaine, exhibit No. 4 contained 0.1 grams of a substance containing cocaine, and exhibit No. 7 contained 0.5 grams of a substance containing heroin. The State then rested.

¶ 11 Defendant testified on his own behalf. He stated he met with Story on February 12, 2008, and "smoked some weed" before she dropped him off at Auto Zone. He testified he did not sell cocaine to her that day or on February 20, 2008. He denied possessing the heroin.

¶ 12 On cross-examination, defendant admitted telling Deputy Dilley that he had sold cocaine in the past. He denied telling Dilley he switched to selling heroin. Following closing arguments, the jury found defendant guilty of possession with intent to deliver the heroin. The jury found defendant not guilty on counts I and II involving the cocaine.

¶ 13 Defendant filed a *pro se* motion for a new trial. In September 2008, defense counsel filed a motion for a new trial. In February 2009, newly appointed counsel filed a petition for a new trial. The trial court denied defendant's motions.

¶ 14 In April 2009, the trial court sentenced defendant to 15 years in prison. In May 2009, defendant filed a *pro se* motion to reconsider sentence. In July 2009, he filed an amended *pro se* motion to reconsider sentence. The court denied these motions.

¶ 15 Defendant appealed, arguing he was denied his right to a fair trial and his counsel was ineffective for failing to object to the prosecutor's questions of him. This court affirmed defendant's conviction and sentence. *People v. Clay*, 4-09-0590 (Oct. 27, 2010) (unpublished order under Supreme Court Rule 23).

¶ 16 In August 2011, defendant filed a *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2010)). Defendant argued (1) his arrest was illegal as it was made without a warrant or probable cause; (2) the heroin was obtained as a result of an unlawful arrest; (3) his *Miranda* rights were violated when he was questioned by Deputy Dilley after his arrest and during his ride to the jail; (4) the State used perjured testimony at trial; (5) his trial and appellate counsel were ineffective; and (6) his 15-year sentence was in excess of the maximum allowed by law.

¶ 17 In November 2011, the trial court found defendant's petition was frivolous and patently without merit. As to issues pertinent to this appeal, the court stated defendant's *Miranda* argument could have been pursued on direct appeal and thus was forfeited. The court stated defendant's claim trial counsel was ineffective was barred by *res judicata*, as this court found the issue was without merit. Moreover, the court found the claim that appellate counsel was ineffective was rebutted by the record, as counsel focused on a single issue "rather than present a multiplicity of issues" and this court agreed that there was error but ultimately concluded it was not reversible error. The court dismissed the petition. This appeal followed.

¶ 18

## II. ANALYSIS

¶ 19 Defendant argues the trial court erred in summarily dismissing his postconviction petition, arguing he stated the gist of a claim of ineffective assistance of trial and appellate counsel and the heroin should have been suppressed as the result of an illegal interrogation. We disagree.

¶ 20 The Act "provides a method by which defendants may assert that, in the proceedings which resulted in their convictions, there was a substantial denial of their federal and/or state constitutional rights." *People v. Wrice*, 2012 IL 111860, ¶ 47, 962 N.E.2d 934. A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *People v. Beaman*, 229 Ill. 2d 56, 71, 890 N.E.2d 500, 509 (2008). The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008).

¶ 21 The Act establishes a three-stage process for adjudicating a postconviction petition. *Beaman*, 229 Ill. 2d at 71, 890 N.E.2d at 509. Here, defendant's petition was dismissed at the first stage. At the first stage, the trial court must review the postconviction petition and determine whether "the petition is frivolous or is patently without merit[.]" 725 ILCS 5/122-2.1(a)(2) (West 2010). Our supreme court has held "a *pro se* petition seeking postconviction relief under the Act for a denial of constitutional rights may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 11-12, 912 N.E.2d 1204, 1209 (2009). A petition lacks an arguable legal basis when it is based on an indisputably meritless legal theory, such as one that is completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212. A petition

lacks an arguable factual basis when it is based on a fanciful factual allegation, such as one that is clearly baseless, fantastic, or delusional. *Hodges*, 234 Ill. 2d at 16-17, 912 N.E.2d at 1212.

¶ 22 "In considering a petition pursuant to [section 122-2.1 of the Act], the [trial] court may examine the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate court in such proceeding[,] and any transcripts of such proceeding." 725 ILCS 5/122-2.1(c) (West 2010); *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010). The petition must be supported by "affidavits, records, or other evidence supporting its allegations," or, if not available, the petition must explain why. 725 ILCS 5/122-2 (West 2010).

¶ 23 "Under the doctrine of *res judicata*, any issues the court considered on direct appeal are barred from being addressed in a postconviction proceeding." *People v. Snow*, 2012 IL App (4th) 110415, ¶ 30, 964 N.E.2d 1139. *Res judicata* also applies "when the issue of ineffectiveness of trial counsel has already been addressed on direct appeal and the postconviction petition added 'somewhat different allegations of incompetence.'" *Snow*, 2012 IL App (4th) 110415, ¶ 30, 964 N.E.2d 1139 (quoting *People v. Albanese*, 125 Ill. 2d 100, 105, 531 N.E.2d 17, 19 (1988)). Any issues that could have been considered on direct appeal are deemed forfeited. *People v. Ligon*, 239 Ill. 2d 94, 103, 940 N.E.2d 1067, 1073 (2010). Our supreme court has noted "the doctrines of *res judicata* and forfeiture are relaxed where fundamental fairness so requires, where the forfeiture stems from the ineffective assistance of appellate counsel, or where the facts relating to the issue do not appear on the face of the original appellate record." *People v. English*, 2013 IL 112890, ¶ 22, \_\_ N.E.2d \_\_. Our review of the first-stage dismissal of a postconviction petition is *de novo*. *People v. Dunlap*, 2011 IL App (4th) 100595, ¶ 20, 963 N.E.2d 394 (citing *Brown*, 236 Ill. 2d at 184, 923 N.E.2d at 754).

¶ 24 In the case *sub judice*, defendant argues the trial court erred in ruling that the issue of counsels' ineffectiveness was *res judicata*. On direct appeal, defendant raised the issue of trial counsel's ineffectiveness pertaining to the failure to object to the prosecutor's questions as to whether the State's witnesses were lying. Thus, defendant was not able to raise that issue in his postconviction petition due to the doctrine of *res judicata*. Moreover, defendant's claims that trial counsel was ineffective for not filing a motion to suppress or for not raising issues pertaining to an illegal arrest or *Miranda* violations were forfeited because they could have been raised on direct appeal. The issue then centers on whether defendant stated the gist of a claim that appellate counsel was ineffective for not raising the issues on appeal, thereby allowing him to proceed beyond the first stage of the postconviction proceedings.

¶ 25 "Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong." *People v. Easley*, 192 Ill. 2d 307, 329, 736 N.E.2d 975, 991 (2000). To establish appellate counsel was ineffective, defendant must satisfy the two-pronged set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *English*, 2013 IL 112890, ¶ 33, \_\_ N.E.2d \_\_. A defendant raising a claim of ineffective appellate counsel "must show both that appellate counsel's performance was deficient and that, but for counsel's errors, there is a reasonable probability that the appeal would have been successful." *People v. Patrenko*, 237 Ill. 2d 490, 497, 931 N.E.2d 1198, 1203 (2010). At the first stage of postconviction proceedings, "a petition alleging ineffective assistance of counsel may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced."

*Patrenko*, 237 Ill. 2d at 497, 931 N.E.2d at 1203.

¶ 26 In his petition, defendant argued his *Miranda* rights were violated when he was questioned by Deputy Dilley on the way to the jail and he made an incriminating statement in response. In his appellate brief, defendant argues the discovery of the heroin was the product of police comments that were equivalent to custodial questioning and, since his *Miranda* rights had not been read to him, the heroin should have been suppressed. We find defendant's petition is based on an indisputably meritless legal theory and was properly dismissed at the first stage of the proceedings.

¶ 27 "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from the custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *People v. Watson*, 315 Ill. App. 3d 866, 876, 735 N.E.2d 75, 83 (2000). Pursuant to the safeguards enunciated in *Miranda*, a suspect "must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda*, 384 U.S. at 444.

¶ 28 Custodial interrogation has been defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444. "Interrogation includes express questioning or other words or actions that police know 'are reasonably likely to elicit an incriminating response from the suspect.'" *People v. Outlaw*, 388 Ill. App. 3d 1072, 1080, 904 N.E.2d 1208, 1217 (2009) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)).

¶ 29 In this case, defendant was in custody when he was transported to the jail. During

the ride, Deputy Dilley told him that if he had anything on him, defendant would be in more trouble if he took it in the jail with him. Defendant told Dilley he had heroin in his crotch. A search later revealed the concealed heroin.

¶ 30 The question by Deputy Dilley here was reasonably likely to elicit an incriminating response from defendant, who was in custody at the time. Because *Miranda* warnings had not been given, the statement was subject to exclusion at trial. However, any error was harmless because the heroin would have been found once defendant was booked into the jail.

¶ 31 Under the inevitable discovery rule, evidence may be "admitted where the State can show that such evidence 'would inevitably have been discovered without reference to the police error or misconduct.'" *People v. Sutherland*, 223 Ill. 2d 187, 228, 860 N.E.2d 178, 209 (2006) (quoting *Nix v. Williams*, 467 U.S. 431, 448 (2006)). Here, the suppression of the heroin would not have been required because "[a] station house inventory of arrestees' possessions is a routine police administrative procedure" and an inventory search would have inevitably led to the discovery of the heroin on defendant's person. *People v. Hoskins*, 101 Ill. 2d 209, 221, 461 N.E.2d 941, 947 (1984) (citing *Illinois v. Lafayette*, 462 U.S. 640, 648 (1983)). As the heroin would have been inevitably discovered, defendant cannot show a reasonable probability that the outcome of the trial would have been different had the statement been excluded from the State's evidence. As this issue has no merit, defendant cannot show appellate counsel was ineffective for not raising it. See *People v. Childress*, 191 Ill. 2d 168, 175, 730 N.E.2d 32, 36 (2000) ("Unless the underlying issue is meritorious, petitioner suffered no prejudice from counsel's failure to raise it on direct appeal."). Also, as defendant's claim of error is completely contradicted by the record, we find the trial court did not err in summarily dismissing his

postconviction petition.

¶ 32

### III. CONCLUSION

¶ 33 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 34 Affirmed.